

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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DISPATCHED

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	
	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149 ✓
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, as Amended	)	
	)	

## SECOND REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 19, 1998

Released: February 26, 1998

Comment Date: March 30, 1998

Reply Comment Date: April 14, 1998

By the Commission: Commissioner Ness approving in part; dissenting in part and issuing a statement.

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## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In passing the Telecommunications Act of 1996 (1996 Act),<sup>1</sup> Congress sought to establish a new "pro-competitive, deregulatory national policy framework"<sup>2</sup> that would replace the statutory and regulatory limitations on competition within and between markets. Congress recognized, however, that the new competitive market forces and technology ushered in by the 1996 Act had the potential to threaten consumer privacy interests. Congress, therefore, enacted section 222 to prevent consumer privacy protections from being inadvertently swept away along with the prior limits on competition.<sup>3</sup> Section 222 establishes a new statutory framework governing carrier use and disclosure of customer proprietary network information (CPNI) and other customer information obtained by carriers in their provision of telecommunications services.

2. Section 222 sets forth three categories of customer information to which different privacy protections and carrier obligations apply -- individually identifiable CPNI, aggregate customer information, and subscriber list information.<sup>4</sup> CPNI includes information that is extremely personal to customers as well as commercially valuable to carriers, such as to whom, where and when a customer places a call, as well as the types of service offerings to which the customer subscribes and the extent the service is used.<sup>5</sup> Aggregate customer and

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<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act) (codified at 47 U.S.C. § § 151 *et seq.*). Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

<sup>2</sup> Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996) (Joint Explanatory Statement).

<sup>3</sup> Representative Markey, the original sponsor of the "Telephone Consumer Privacy Protection Act of 1993," which was the first iteration of what ultimately evolved into section 222, explained: "As recent events have made clear, we are undoubtedly in a full-fledged technological revolution. This revolution promises exciting new services and products that will change the way we live, work, and play . . . . If adequate safeguards are not in place to protect consumers, however, the same technology that serves to empower individuals can also imperil them by fostering and abetting invasions of personal privacy. The legislation I am introducing today will ensure that the fundamental privacy rights of each American will be protected even as this new era of communications becomes ever more sophisticated and ubiquitously deployed." Extension of Remarks of Edward J. Markey, 139 Cong. Rec. E2745-01.

<sup>4</sup> Sections 222(a) and (b) also establish obligations and restrictions in connection with carrier proprietary information. The nature of these obligations are not addressed in this order, but rather are the subject of the accompanying *Further Notice of Proposed Rulemaking*. See discussion *infra* Part IX.

<sup>5</sup> Section 222(f)(1) defines CPNI as: "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the

subscriber list information, unlike individually identifiable CPNI, involve customer information that is not private or sensitive, but like CPNI, is nevertheless valuable to competitors. Aggregate customer information is expressly defined as "collective data that relates to a group or category of services or customers, *from which individual customer identities and characteristics have been removed*."<sup>6</sup> Subscriber list information, although consisting of individually identifiable information, is defined in terms of *public*, not private, information, including the "*listed names, numbers, addresses, or classifications . . . that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format*."<sup>7</sup>

3. In contrast to other provisions of the 1996 Act that seek primarily to "[open] all telecommunications markets to competition,"<sup>8</sup> and mandate competitive access to facilities and services, the CPNI regulations in section 222 are largely consumer protection provisions that establish restrictions on carrier use and disclosure of personal customer information. With section 222, Congress expressly directs a balance of "both competitive and consumer privacy interests with respect to CPNI."<sup>9</sup> Congress' new balance, and privacy concern, are evidenced by the comprehensive statutory design, which expressly recognizes the duty of *all* carriers to protect customer information,<sup>10</sup> and embodies the principle that customers must be able to control information they view as sensitive and personal from use, disclosure, and access by carriers.<sup>11</sup> Where information is not sensitive,<sup>12</sup> or where the customer so directs,<sup>13</sup>

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carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." 47 U.S.C. § 222(f)(1). See *infra* generally Part IV, for discussion of carriers' use of CPNI for marketing purposes.

<sup>6</sup> 47 U.S.C. § 222(f)(2)(emphasis added). See *infra* generally Part VI, for discussion of carriers' use of aggregate information for marketing purposes, including, for example, in developing new service offerings for its existing customers as well as for creating customer profiles that can be useful in targeting new customers.

<sup>7</sup> 47 U.S.C. § 222(f)(3)(emphasis added). Subscriber list information is critically important to the development of specialized and competitive directory publications.

<sup>8</sup> Joint Explanatory Statement at 1.

<sup>9</sup> *Id.* at 205.

<sup>10</sup> 47 U.S.C. § 222(a)(establishes general duty, titled "Privacy of Customer Information").

<sup>11</sup> See discussion *infra* Part IV.B.2.b (section 222(c)(1), titled "Confidentiality of Customer Proprietary Network Information," embodies principle of customer control).

<sup>12</sup> See, e.g., section 222(c)(3)(involving aggregate customer information, defined as non-personal information); section 222(e)(involving subscriber list information, defined as published information).

the statute permits the free flow or dissemination of information beyond the existing customer-carrier relationship. Indeed, in the provisions governing use of aggregate customer and subscriber list information, sections 222(c)(3) and 222(e) respectively, where privacy of sensitive information is by definition *not* at stake, Congress expressly *required* carriers to provide such information to third parties on nondiscriminatory terms and conditions.<sup>14</sup> Thus, although privacy and competitive concerns can be at odds, the balance struck by Congress aligns these interests for the benefit of the consumer. This is so because, where customer information is not sensitive, the customer's interest rests more in choosing service with respect to a variety of competitors, thus necessitating competitive access to the information, than in prohibiting the sharing of information.

4. In this *Second Report and Order*, we promulgate regulations to implement the statutory obligations of section 222. We also review our existing regulatory framework governing CPNI, and resolve CPNI issues raised in other proceedings that have been deferred to this proceeding, including obligations in connection with sections 272 and 274 of the 1996 Act. More specifically, for the reasons discussed herein, we modify our rules and procedures regarding CPNI and implement section 222 as follows:

(a) We permit carriers to use CPNI, without customer approval, to market offerings that are related to, but limited by, the customer's existing service relationship with their carrier.<sup>15</sup>

(b) Before carriers may use CPNI to market service outside the customer's existing service relationship, we require that carriers obtain express customer approval.<sup>16</sup>

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<sup>13</sup> See discussion *infra* Part V.B.2. Under section 222(c)(1) carriers can use, disclose or permit access to CPNI upon the "approval" of the customer. 47 U.S.C. § 222(c)(1). Under section 222(c)(2) carriers "shall disclose [CPNI], upon affirmative written request by the customer, to any person designated by the customer." 47 U.S.C. § 222(c)(2).

<sup>14</sup> Section 222(c)(3) provides in pertinent part: "A local exchange carrier may use, disclose or permit access to aggregate customer information other than for purposes described in paragraph (1) *only if it provides such aggregate information to other carriers or persons on reasonable and nondiscriminatory terms and conditions upon reasonable request therefor.*" 47 U.S.C. § 222(c)(3)(emphasis added). Section 222(e) provides that "notwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides telephone exchange service *shall provide* subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, *under nondiscriminatory and reasonable rates, terms and conditions, to any person upon request* for the purpose of publishing directories in any format." 47 U.S.C. § 222(e)(emphasis added).

<sup>15</sup> See discussion *infra* Part IV.B.

<sup>16</sup> See discussion *infra* Part V.B.

Such express approval may be written, oral, or electronic.<sup>17</sup> In order to ensure that customers are informed of their statutory rights before granting approval, we further require carriers to provide a one-time notification of customers' CPNI rights prior to any solicitation for approval.<sup>18</sup>

(c) We eliminate the *Computer III* CPNI framework, as well as sections 22.903(f) and 64.702(d)(3) of our rules, in light of the comprehensive regulatory scheme Congress established in section 222.<sup>19</sup>

(d) We reconcile section 222 with sections 272 and 274, and interpret the latter two provisions to impose no additional CPNI requirements on the Bell Operating Companies (BOCs).<sup>20</sup>

5. Finally, in a *Further Notice of Proposed Rulemaking (Further Notice)* we seek additional comment on three issues involving carrier duties and obligations established under sections 222(a) and (b) of the 1996 Act.<sup>21</sup> In particular, we seek further comment on (a) the customer's right to restrict carrier use of CPNI for all marketing purposes;<sup>22</sup> (b) the appropriate protections for carrier information and additional enforcement mechanisms we may apply;<sup>23</sup> and (c) the foreign storage of, and access to, domestic CPNI.<sup>24</sup>

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<sup>17</sup> See discussion *infra* Part V.C.

<sup>18</sup> See discussion *infra* Parts V.F and V.G.

<sup>19</sup> See discussion *infra* Part VIII.

<sup>20</sup> See discussion *infra* Part VII.

<sup>21</sup> Section 222(a) states that: "[E]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier." 47 U.S.C. § 222(a). Section 222(b) states that: "[A] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." 47 U.S.C. § 222(b).

<sup>22</sup> See discussion *infra* Part IX.A.

<sup>23</sup> See discussion *infra* Part IX.B.

<sup>24</sup> See discussion *infra* Part IX.C.

## II. BACKGROUND

6. In response to various informal requests for guidance from the telecommunications industry regarding the obligation of carriers under new section 222,<sup>25</sup> the Commission released a *Notice of Proposed Rulemaking*<sup>26</sup> on May 17, 1996. The *Notice*, among other things, sought comment on: (1) the scope of the phrase "telecommunications service," as it is used in section 222(c)(1), which permits carriers to use, disclose, or permit access to individually identifiable CPNI without obtaining customer approval;<sup>27</sup> (2) the requirements for customer approval;<sup>28</sup> and (3) whether the Commission's existing CPNI requirements should be amended in light of section 222.<sup>29</sup>

7. Prior to the 1996 Act, the Commission had established CPNI requirements applicable to the enhanced services<sup>30</sup> operations of AT&T, the BOCs, and GTE, and the CPE

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<sup>25</sup> See, e.g., Letter from Mary McDermott, United States Telephone Association (USTA) to Regina Keeney, Chief of the Common Carrier Bureau, FCC, on behalf of USTA, the National Rural Telephone Association (NRTA), the National Telephone Cooperative Association (NTCA), and the Organization for the Promotion & Advancement of Small Telecommunications Companies (OPASTCO), dated February 14, 1996 (Association Letter). See also Petition of the NYNEX Telephone Companies for a Declaratory Ruling as to the Interpretation of Section 222 of the Communications Act (filed Mar. 5, 1996) (NYNEX Petition); Letter from Lawrence E. Sargeant, Vice President - Federal Regulatory, U S WEST, to Regina M. Keeney, Chief, Common Carrier Bureau, FCC, filed March 27, 1996 (disagreeing with NYNEX's interpretation of CPNI provisions). The NYNEX Petition sought a declaratory ruling with regard to the meaning of the term "telecommunications service" as used in section 222(c)(1). NYNEX specifically argued that intraLATA service should be distinguished from interLATA service for the purpose of applying section 222. U S WEST, in a letter response to the NYNEX petition, expressed disagreement with NYNEX's interpretation of the CPNI provisions of the statute and argued that section 222 supported the broad use of CPNI in a carrier's provision of telecommunications services.

<sup>26</sup> *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Notice of Proposed Rulemaking, CC Docket No. 96-115, 11 FCC Rcd 12513 (1996) (*Notice*).

<sup>27</sup> *Notice* at 12523-26, ¶¶ 20-26.

<sup>28</sup> *Notice* at 12526-28, ¶¶ 27-33.

<sup>29</sup> *Notice* at 12529-31, ¶¶ 38-42.

<sup>30</sup> "Enhanced services" generally include such services as voice mail, electronic mail, electronic store-and-forward, fax store-and-forward, data processing, and gateways to on-line databases. Prior to the 1996 Act, enhanced services were defined as services "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a); see also *North American Telecommunications Association Petition for Declaratory Ruling Under Section 64.702 of*



operations of AT&T and the BOCs, in the *Computer II*,<sup>31</sup> *Computer III*,<sup>32</sup> *GTE ONA*,<sup>33</sup> and *BOC CPE Relief*<sup>34</sup> proceedings. The Commission recognized in the *Notice* that it had adopted these CPNI requirements, together with other nonstructural safeguards, to protect independent enhanced services providers and CPE suppliers from discrimination by AT&T, the BOCs, and

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*the Commission's Rules Regarding the Integration of Centrex, Enhanced Services and Customer Premises Equipment*, 101 FCC 2d 349 (1985), *recon.*, 3 FCC Rcd 4385 (1988).

<sup>31</sup> *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Docket No. 20828, 77 FCC 2d 384 (1980) (*Final Order*), *recon.*, 84 FCC 2d 50 (1980) (*Reconsideration Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

<sup>32</sup> *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III)*, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon. Order*); *Phase I Order and Phase I Recon. Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), *further recon.*, 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*); *Phase II Order vacated. California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceeding*, CC Docket No. 90-368, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *BOC Safeguards Order vacated in part and remanded sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 115 S. Ct. 1427 (1995) (referred to collectively as the *Computer III* proceeding); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket 95-20, Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (*Computer III Further Remand Notice*), Further Notice of Proposed Rulemaking, FCC 98-8 (rel. Jan. 29, 1998) (*Computer III Further Remand Further Notice*). See also *Filing and Review of Open Network Architecture Plans*, CC Docket 88-2, Phase I, 4 FCC Rcd 1, 209-10, ¶¶ 398-99 (1988) (*BOC ONA Order*); *In the Matter of Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co.*, CC Docket No. 85-26, Memorandum Opinion and Order, 102 FCC 2d 655 (1985) (*AT&T Structural Relief Order*), *recon.*, *Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co.*, CC Docket No. 85-26, Memorandum Opinion and Order on Reconsideration, 104 FCC 2d 739, 768 (1986) (*AT&T Structural Relief Reconsideration Order*).

<sup>33</sup> *In the Matter of Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corp.*, CC Docket No. 92-256, Report and Order, 9 FCC Rcd 4922, 4944-45, ¶ 45 (1994) (*GTE Safeguards Order*); *Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corp.*, CC Docket No. 92-256, Memorandum Opinion and Order, 11 FCC Rcd 1388, 1419-25, ¶¶ 73-86 (1995) (*GTE ONA Order*).

<sup>34</sup> *In the Matter of Furnishing of Customer Premises Equipment by Bell Operating Telephone Companies and the Independent Telephone Companies*, CC Docket No. 86-79, Report and Order, 2 FCC Rcd 143 (1987) (*BOC CPE Relief Order*), *recon. on other grounds*, 3 FCC Rcd 22 (1987); *aff'd*, 883 F.2d 104 (D.C. Cir. 1989).

GTE.<sup>35</sup> The *Notice* stated that the Commission's existing CPNI requirements were intended to prohibit AT&T, the BOCs, and GTE from using CPNI obtained from their provision of regulated services to gain a competitive advantage in the unregulated CPE and enhanced services markets.<sup>36</sup> The *Notice* further stated that the existing CPNI requirements also were intended to protect legitimate customer expectations of confidentiality regarding individually identifiable information.<sup>37</sup> The Commission concluded in the *Notice* that existing CPNI requirements would remain in effect, pending the outcome of this rulemaking, to the extent that they do not conflict with section 222.<sup>38</sup> On November 13, 1996, the Common Carrier Bureau (Bureau) waived the annual CPNI notification requirement for multi-line business customers that had been imposed on AT&T, the BOCs, and GTE under our pre-existing CPNI framework, pending our action in this proceeding.<sup>39</sup>

8. On August 7, 1996, the Commission released the *First Report and Order* in the CPNI proceeding.<sup>40</sup> In the *First Report and Order*, the Commission affirmed its tentative conclusion that, even if a carrier has received customer approval to use CPNI pursuant to section 222(c)(1), such approval does not extend to the carrier's use of CPNI involving the occurrence of calls received by alarm monitoring service providers,<sup>41</sup> pursuant to the ban on such use in section 275(d).<sup>42</sup> Noting that section 222 sets forth limitations on the ability of telecommunications carriers, their affiliates, and unaffiliated parties to obtain access to CPNI, the Commission further concluded that it was not necessary to bar completely certain of these

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<sup>35</sup> *Notice* at 12516, ¶ 4.

<sup>36</sup> *Notice* at 12516, 12530, ¶¶ 4, 40.

<sup>37</sup> *Notice* at 12516, ¶ 4.

<sup>38</sup> *Notice* at 12515-16, 12529, ¶¶ 3, 38.

<sup>39</sup> *Petition for Exemption from Customer Proprietary Network Information Notification Requirements*, Order, CCB Pol 96-20, DA 96-1878, 12 FCC Rcd 15134. On December 16, 1997, the Policy and Program Planning Division waived this requirement for 1997. *In the Matter of Waiver from Customer Proprietary Network Information Notification Requirements*, CCB Pol 97-13, DA 97-2599 (rel. Dec. 16, 1997).

<sup>40</sup> *In the Matter of the Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information; Use of Data Regarding Alarm Monitoring Service Providers*, CC Docket No. 96-115, Report and Order, 11 FCC Rcd 9553 (1996).

<sup>41</sup> For example, LEC personnel may not use information regarding the occurrence or content of calls received by alarm monitoring service providers, even with customer approval under section 222(c)(1), for purposes of marketing alarm monitoring services.

<sup>42</sup> 11 FCC Rcd at 9554, ¶ 3.

entities from accessing CPNI simply because they market alarm monitoring services.<sup>43</sup> The Commission deferred deciding the issue of whether any restrictions on access to CPNI were necessary to effectuate the prohibition contained in section 275(d).<sup>44</sup>

9. On December 24, 1996, the Commission released the *Non-Accounting Safeguards Order*, which adopted rules and policies governing the BOCs' provision of certain services through section 272 affiliates.<sup>45</sup> In that order, the Commission concluded that the nondiscrimination provisions of section 272(c)(1) govern the BOCs' use of CPNI and that the BOCs must comply with the requirements of both sections 222 and 272(c)(1).<sup>46</sup> The Commission deferred to this proceeding, however, all other issues concerning the interplay between those provisions.<sup>47</sup> On February 7, 1997, the Commission released the *Electronic Publishing Order*, which adopted policies and rules governing, among other things, the BOCs' provision of electronic publishing under section 274.<sup>48</sup> In that order, the Commission likewise deferred to this proceeding all CPNI-related issues involved in the BOCs' marketing of electronic publishing services.<sup>49</sup> In light of the Commission's determinations in the *Non-Accounting Safeguards* and *Electronic Publishing* orders, the Bureau issued a *Public Notice* on February 20, 1997, seeking to supplement the record in this proceeding on specific issues relating to the subjects previously noticed and their interplay with sections 272 and 274.<sup>50</sup> Finally, the Commission released the *CMRS Safeguards Order* on October 3, 1997, in which it eliminated section 22.903 of the rules generally, but expressly retained subsection 22.903(f),

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<sup>43</sup> *Id.* at 9558, ¶ 11.

<sup>44</sup> *Id.*

<sup>45</sup> *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), recon. pending, Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Report and Order, 12 FCC Rcd 15756 (1997), *aff'd sub nom. Bell Atlantic Telephone Companies, et al. v. FCC, et al.*, No. 97-1432, 1997 WL 783993 (D.C. Cir. 1997).

<sup>46</sup> *Id.* at 22010, ¶ 222.

<sup>47</sup> *Id.*

<sup>48</sup> *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, Report and Order, 12 FCC Rcd 5361 (1997) (*Electronic Publishing Order*), recon. pending.

<sup>49</sup> *Id.* at 5432, ¶ 169.

<sup>50</sup> *Common Carrier Bureau Seeks Further Comment on Specific Questions in CPNI Rulemaking*, CC Docket No. 96-115, Public Notice, 12 FCC Rcd 3011 (1997) (*Public Notice*).

regarding the BOCs' sharing of CPNI with cellular affiliates, pending the outcome of this proceeding.<sup>51</sup>

10. In this *Second Report and Order*, we address the scope and meaning of section 222, as well as the issues deferred to this proceeding. We will consider subsequently, in a separate order, the meaning and scope of section 222(e) of the 1996 Act, relating to the disclosure of subscriber list information by local exchange carriers.<sup>52</sup> We note that LECs became obligated to disclose subscriber list information to directory publishers on nondiscriminatory rates, terms, and conditions, upon passage of the Act. Accordingly, the LEC's duty exists presently, independent of any implementing rules we might promulgate in the future, and a failure to discharge this duty may well, depending on the circumstances, constitute both a violation of section 222(e) and an unreasonable practice in violation of section 201(b).<sup>53</sup>

### III. COMMISSION AUTHORITY

#### A. Background

11. Shortly after passage of the 1996 Act, various telecommunications carriers and carrier associations, as indicated above, sought guidance from the Bureau regarding the scope of their obligations under section 222.<sup>54</sup> In particular, several associations representing a majority of the local exchange carriers (LECs) asked, among other things, that the Commission commence a rulemaking to resolve questions concerning the LECs' responsibilities under the new CPNI provisions of the 1996 Act. In addition, NYNEX filed a petition for declaratory ruling seeking confirmation of its interpretation of one aspect of section 222.<sup>55</sup>

12. The Commission tentatively concluded in the *Notice* that regulations interpreting and specifying in greater detail a carrier's obligations under section 222 would be in the public interest, and sought comment on that tentative conclusion.<sup>56</sup> The Commission

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<sup>51</sup> *In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162, Report and Order, 12 FCC Rcd 15668 (1997) (*CMRS Safeguards Order*).

<sup>52</sup> 47 U.S.C. § 222(e).

<sup>53</sup> 47 U.S.C. § 201(b).

<sup>54</sup> *Supra* ¶ 6; *supra* note 25.

<sup>55</sup> *Id.*

<sup>56</sup> *Notice* at 12521, ¶ 15.

also sought comment on the extent to which section 222 permits states to impose CPNI requirements in addition to any adopted by the Commission, as well as on whether such state CPNI regulation would enhance or impede valid federal interests with respect to CPNI.<sup>57</sup> The Commission further sought comment on whether the CPNI provisions of section 222 may, by themselves, give it jurisdiction over both the interstate and intrastate use and protection of CPNI with respect to matters falling within the scope of that statutory provision.<sup>58</sup>

13. Parties commenting in response to the *Notice* generally join the petitioning carrier associations in urging the Commission to clarify the CPNI requirements established in section 222.<sup>59</sup> Some commenters further maintain that the Commission has authority to adopt rules implementing section 222 that apply both to interstate and intrastate aspects of CPNI.<sup>60</sup> Other parties, disagreeing, contend that section 222 does not give the Commission jurisdiction over interstate and intrastate use and protection of CPNI or that states should be free to adopt various CPNI requirements, or both.<sup>61</sup>

## B. Discussion

14. We confirm our tentative conclusion and find that our clarification of the CPNI obligations imposed on carriers by section 222 would serve the public interest. As discussed more fully herein, we are persuaded that Congress established a comprehensive new framework in section 222, which balances principles of privacy and competition in connection with the use and disclosure of CPNI and other customer information.<sup>62</sup> Given the conflicting interpretations of the statute proposed by the various parties, and drawing from our knowledge and historical experience regulating CPNI use and protection, we conclude that our clarification of this provision is necessary and consistent with what Congress envisioned to ensure a uniform national CPNI policy.<sup>63</sup> It is well-established that an agency has the

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<sup>57</sup> *Id.* at 12522, ¶ 17.

<sup>58</sup> *Id.* at 12523, ¶ 18.

<sup>59</sup> *See, e.g.*, Arch Comments at 2; Sprint Comments at 2; Texas Commission Comments at 4.

<sup>60</sup> *See, e.g.*, Excel Comments at 2-3; LDDS Worldcom Comments at 6. LDDS Worldcom Reply at 2.

<sup>61</sup> *See, e.g.*, California Commission Comments at 8; CPSR Reply at 5; Washington Commission Comments at 2.

<sup>62</sup> *See* discussion *infra* Part VII.B.2. and Part VIII.B.2.

<sup>63</sup> *See, e.g.*, Ad-Hoc Reply at 7 (Commission should establish national rules); AirTouch Comments at 2 n.1 (same); CPI Reply at 2 (same); Frontier Comments at 12 (same); MFS Comments at 11 (same). *See also* Arch Comments at 2 (authority to interpret section 222 rests with the Commission); AT&T Comments at 16-17 & n.21 (same).

authority to adopt rules to administer congressionally mandated requirements.<sup>64</sup> Indeed, courts repeatedly have held that the Commission's general rulemaking authority is "expansive" rather than limited.<sup>65</sup> We agree with the petitioning carrier associations, and essentially all other commenters, that our clarification of section 222 will serve to reduce confusion and controversy.<sup>66</sup>

15. We further conclude that our authority to promulgate regulations implementing section 222 extends to both the interstate and intrastate use and protection of CPNI and other customer information in several important respects.<sup>67</sup> Specifically, the Communications Act, as enacted in 1934, established a dual system of state and federal regulation over telecommunications. Section 2(a) extends jurisdiction for interstate matters to the Commission and section 2(b) reserves intrastate matters to the states. Based on the Act's grant of jurisdiction, the Commission has historically regulated the use and protection of CPNI by AT&T, the BOCs, and GTE, through the rules established in the *Computer III* proceedings. Sections 4(i),<sup>68</sup> 201(b),<sup>69</sup> and 303(r)<sup>70</sup> of the Act authorize the Commission to adopt any rules it deems necessary or appropriate to carry out its responsibilities under the Act, so long as those rules are not otherwise inconsistent with the Act.<sup>71</sup>

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<sup>64</sup> See, e.g., *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (holding that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress).

<sup>65</sup> *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943); see also *FCC v. Nat'l Citizens Comm. for Broadcasting*, 36 U.S. 775, 793 (1978).

<sup>66</sup> See, e.g., Arch Comments at 2; Sprint Comments at 2; Texas Commission Comments at 4.

<sup>67</sup> For the reasons described above, there is no question that we have authority to regulate interstate use and protection of CPNI under section 222. We have historically regulated such interstate CPNI matters, and section 222 extends to all carriers, including interstate service providers. Indeed, section 222(f)(1)(B) expressly defines CPNI as including, among other things, "information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." 47 U.S.C. § 222(f)(1)(B).

<sup>68</sup> 47 U.S.C. § 154(i).

<sup>69</sup> 47 U.S.C. § 201(b).

<sup>70</sup> 47 U.S.C. § 303(r).

<sup>71</sup> See, e.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956).

16. In *Louisiana Pub. Serv. Comm'n v. FCC*,<sup>72</sup> the Supreme Court held that, even where Congress has not provided the Commission with a direct grant of authority over intrastate matters, the Commission may preempt state regulation where such regulation would negate the Commission's exercise of its lawful authority because regulation of the interstate aspects of the matter cannot be severed from regulation of the intrastate aspects. The Court of Appeals for the Ninth Circuit applied this principle, generally referred to as the "impossibility exception," in the specific context of a state CPNI regulation even prior to the 1996 Act.<sup>73</sup> In *California III*, the Ninth Circuit upheld the Commission's preemption of California regulations that required prior customer approval for access to CPNI, under the impossibility exception.<sup>74</sup> We conclude that, in connection with CPNI regulation, the Commission may preempt state regulation of intrastate telecommunications matters where such regulation would negate the Commission's exercise of its lawful authority because regulation of the interstate aspects of the matter cannot be severed from regulation of the intrastate aspects.<sup>75</sup> As several parties observe, where a carrier's operations are regional or national in scope, state CPNI regulations that are inconsistent from state to state may interfere greatly with a carrier's ability to provide service in a cost-effective manner.<sup>76</sup> In addition, as MCI points out, even if a state written approval requirement were limited to the use of CPNI for the marketing of intrastate services, for example, it would disrupt interstate service marketing because it would be impractical to limit marketing to interstate services.<sup>77</sup> On this basis, we find inapplicable the limitation on federal regulation of purely intrastate

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<sup>72</sup> 476 U.S. 355, 375-76 n.4 (1986)(*Louisiana Commission*).

<sup>73</sup> *California v. FCC*, 39 F.3d 919 (9th Cir. 1994)(*California III*), *supra* note 32.

<sup>74</sup> *California III*, 39 F.3d at 933.

<sup>75</sup> Because we conclude that we have authority to preempt conflicting state CPNI regulations under the "impossibility" exception, we do not reach, and offer no opinion on, MCI's further contention that we may preempt inconsistent state CPNI regulations on the basis of our authority pursuant to section 253 of the Act. MCI Comments at 15.

<sup>76</sup> Arch Comments at 2; Excel Comments at 2; Frontier Comments at 12; LDDS Comments at 6; MCI Comments at 12-13; MFS Comments at 11.

<sup>77</sup> MCI Comments at 13.

telecommunications matters in section 2(b) of the Act,<sup>78</sup> as well as Congress' prohibition on implied preemption in section 601(c) of the 1996 Act.<sup>79</sup>

17. Several commenters interpret *California III* to support their view that state rules would conflict with section 222 if they are more *restrictive* -- that is, permit less carrier use and disclosure of CPNI -- than the Commission's implementing regulations.<sup>80</sup> These commenters rely on *California III*, where the court specifically upheld the Commission's preemption of California's prior authorization rule in favor of the Commission's less restrictive notice rule,<sup>81</sup> reasoning that such state regulations would negate the Commission's exercise of its lawful authority over interstate telecommunications services.<sup>82</sup> In contrast, other commenters contend that, consistent with *California III*, the Commission should establish minimum federal standards under section 222 for the use, disclosure, and permission of access to CPNI, yet permit states to exceed those standards.<sup>83</sup> These parties reason that, although federal standards are needed to monitor the use of CPNI, state regulators are best suited to deal with particular problems faced by consumers in their state,<sup>84</sup> and further argue

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<sup>78</sup> Section 2(b) provides, in pertinent part, that "nothing in this Act shall be construed to apply or give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." 47 U.S.C. § 152(b).

<sup>79</sup> Section 601(c) of the 1996 Act provides that the 1996 Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 1996 Act, § 601(c)(1), 110 Stat. 56, 143 (to be codified as a note following 47 U.S.C. § 152).

<sup>80</sup> Bell Atlantic Comments at 10; MCI Comments at 12; NYNEX Comments at 17-18; USTA Reply at 8-9.

<sup>81</sup> *California III*, 39 F.3d at 932. In *California III*, the U.S. Court of Appeals for the Ninth Circuit upheld the Commission's preemption of state CPNI regulations that required carriers to obtain prior customer authorization from all customers (not merely those with more than 20 lines) before they could use CPNI in connection with their enhanced services. At this time, California's prior authorization rule was inconsistent with the CPNI regulations announced in the Commission's *BOC Safeguards Order*.

<sup>82</sup> Cf. SBC Comments at 20-21 (state CPNI regulations that permit greater use of CPNI than the Commission's rules, or that are more flexible with respect to customer approval, would be consistent with section 601(c)).

<sup>83</sup> Ad Hoc Reply at 7-8; CFA Comments at 2-3; CPI Reply at 2; CPSR Reply at 4.

<sup>84</sup> Ad Hoc Reply at 8; California Commission Comments at 8; CFA Comments at 2-3; CPSR Reply at 4; Texas Commission Comments at 5. In particular, the California Commission and the Texas Commission contend that states should have flexibility to establish rules that protect customer privacy expectations, while balancing competitive interests, because such state rules would not necessarily harm the development of a seamless, national telecommunications network. California Commission Comments at 5; California Commission Reply at 10; Texas Commission Comments at 5. The California Commission further asserts that states are better



that state requirements that provide additional privacy protections to consumers would not conflict with the Commission's rules.<sup>85</sup>

18. Because no specific state regulations are before us, we do not at this time exercise our preemption authority. Rather, we agree with NYNEX that after states have had an opportunity to react to the requirements we adopt in this order, we should then examine any conflicting state rules on a case-by-case basis.<sup>86</sup> State rules that likely would be vulnerable to preemption would include those permitting greater carrier use of CPNI than section 222 and our implementing regulations announced herein, as well as those state regulations that sought to impose more limitations on carriers' use. This is so because state regulation that would permit more information sharing generally would appear to conflict with important privacy protections advanced by Congress through section 222, whereas state rules that sought to impose more restrictive regulations would seem to conflict with Congress' goal to promote competition through the use or dissemination of CPNI or other customer information.<sup>87</sup> In either regard, the balance would seemingly be upset and such state regulation thus could negate the Commission's lawful authority over interstate communication and stand as an obstacle to the accomplishment and execution of the full purposes and

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equipped to take account of customer privacy expectations that vary by state, region, or community, and it notes, in this regard, that the State of California has amended its Constitution to make the right to privacy an inalienable right. California Commission Reply at 10.

<sup>85</sup> California Commission Reply at 2; CPI Reply at 2; CPSR Reply at 5; PaOCA Comments at 6; Sprint Comments at 2; TRA Comments at 7. In particular, CPSR contends that there can be no "conflict" between the privacy goals of the Act and the strongest state CPNI rules because the fundamental federal CPNI policy is protecting consumer privacy. CPSR Reply at 5. Similarly, the California Commission contends that California's CPNI rules, which prohibit a telephone company from disclosing a residential customer's CPNI absent written customer consent, is consistent with the intent of the 1996 Act. California Commission Comments at 6; *see also* Washington Commission Comments at 3 (federal preemption may not be necessary, noting that the Commission did not preempt state privacy protections in the *Caller ID* proceeding, and the resulting regulatory scheme has been workable).

<sup>86</sup> NYNEX Comments at 18.

<sup>87</sup> In particular, as discussed *infra* Part IV, we conclude that Congress intended for carriers to use and disclose information without express customer approval for marketing related offerings within the customers' total service offering, but not to permit carrier use of CPNI to market new categories of service outside that offering. If state regulation were to treat the scope of service differently, and restrict, for example, carriers from using CPNI to market distinct CMRS offerings, that would seem to conflict with section 222's balance of competition and privacy concerns. Bell Atlantic Comments at 10; MCI Comments at 12-13. On the other hand, state rules that would give less weight to privacy concerns by permitting carrier use of CPNI outside the scope of section 222(c)(1) based on notice and opt-out approval would also appear to be in conflict with the balance struck by Congress. Arch Comments at 3-5; CFA Comments at 3.

objectives of Congress.<sup>88</sup> Other state rules, however, may not directly conflict with Congress' balance or goals, for example, those specifying various information that must be contained in the carrier's notice requirement, that are in addition to those specified in this order.

19. An alternative basis for concluding that our jurisdiction extends to the intrastate use and protection of CPNI stems additionally from section 222(f)(1)(B), which expressly defines CPNI as including, among other things, "information contained in the bills pertaining to *telephone exchange service* or telephone toll service received by a customer of a carrier."<sup>89</sup> Section 222(e) similarly provides that: "[n]otwithstanding subsections (b), (c), and (d), a telecommunications carrier that provides *telephone exchange service* shall provide subscriber list information gathered in its capacity as a provider of *such service* on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions . . ."<sup>90</sup> Insofar as telephone exchange service is virtually an exclusively intrastate service,<sup>91</sup> these references expressly also extend the scope of section 222 to intrastate matters. For this reason as well we conclude that neither section 2(b) of the Communications Act of 1934 nor section 601(c) of the 1996 Act precludes our regulation of the intrastate use and protection of CPNI pursuant to section 222.<sup>92</sup>

20. We thus conclude that section 222, and the Commission's authority thereunder, apply to regulation of intrastate and interstate use and protection of CPNI. We find, therefore, that the rules we establish to implement section 222 are binding on the states, and that the states may not impose requirements inconsistent with section 222 and our implementing regulations.

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<sup>88</sup> *Louisiana Commission*, 476 U.S. at 375-76 n.4; *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *California III*, 39 F.3d at 933; *NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989).

<sup>89</sup> 47 U.S.C. § 222(f)(1)(B)(emphasis added).

<sup>90</sup> 47 U.S.C. § 222(e)(emphasis added).

<sup>91</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21926 ¶ 38 (1996) (*Non-Accounting Safeguards Order*), recon. pending. The 1996 Act defines "telephone exchange service" to mean: ". . . (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47).

<sup>92</sup> We therefore disagree with those parties suggesting we lack such authority. See, e.g., CPSR Reply at 6 n.9; Washington Commission Comments at 2 n.2.

#### IV. CARRIER'S RIGHT TO USE CPNI WITHOUT CUSTOMER APPROVAL

##### A. Overview

21. Section 222(c)(1) and section 222(d) set forth the circumstances under which a carrier may use, disclose, or permit access to CPNI without customer approval. Specifically, section 222(c)(1) provides that a telecommunications carrier that receives or obtains CPNI by virtue of its "provision of a *telecommunications service* shall *only* use, disclose, or permit access to individually identifiable [CPNI] in its provision of (A) *the telecommunications service* from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories."<sup>93</sup> Section 222(d) provides:

[n]othing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to [CPNI] obtained from its customers, either directly or indirectly through its agents -- (1) to initiate, render, bill, and collect for telecommunications services; (2) to protect the rights or property of the carrier, or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services; or (3) to provide any inbound telemarketing, referral, or administrative services to the customer for the duration of the call, if such call was initiated by the customer and the customer approves of the use of such information to provide such service.<sup>94</sup>

22. Numerous parties comment on the proper interpretation of section 222(c)(1) because this provision governs, among other things, the scope of a carrier's right to use CPNI for customer retention and marketing purposes, without having to seek some form of customer approval. Most carriers acknowledge that they view CPNI as an important asset of their business, and many state that they hope to use CPNI as an integral part of their future marketing plans.<sup>95</sup> Indeed, as competition grows and the number of firms competing for consumer attention increases, CPNI becomes a powerful resource for identifying potential customers and tailoring marketing strategies to maximize customer response.<sup>96</sup> Accordingly, a broad interpretation of the scope of section 222(c)(1) would afford carriers the opportunity to

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<sup>93</sup> 47 U.S.C. § 222(c)(1) (emphasis added).

<sup>94</sup> 47 U.S.C. § 222(d).

<sup>95</sup> See, e.g., *PacTel ex parte* (filed Nov. 22, 1996) at 9; *SBC ex parte* (filed Sept. 27, 1996) at 3; *U S WEST ex parte* (filed Oct. 17, 1996) at 8.

<sup>96</sup> *NTIA ex parte* (filed Apr. 14, 1997) at att. at 6 (*Privacy and the NII: Safeguarding Telecommunications-Related Personal Information*) (NTIA Privacy Report). The NTIA Privacy Report further observes that, as competition squeezes profit margins, carriers have an incentive to sell their CPNI to supplement their revenue. *Id.* at 6-7.

use, disclose, or permit access to CPNI expansively. A narrow interpretation, conversely, would restrict the use carriers can make of CPNI absent customer approval.

23. We conclude that the general framework established under section 222, considered as a whole, carves a limited exception in section 222(c)(1) for carrier use, disclosure, and permission of access to sensitive customer information. Specifically, sections 222(c)(1)(A) and (B), as well as the narrow exceptions in section 222(d), represent the only instances where customer approval for a carrier to use, disclose, or permit access to personal customer information is not required. We believe that the language of section 222(c)(1)(A) and (B) reflects Congress' judgment that customer approval for carriers to use, disclose, and permit access to CPNI can be *inferred* in the context of an existing customer-carrier relationship. This is so because the customer is aware that its carrier has access to CPNI, and, through subscription to the carrier's service, has implicitly approved the carrier's use of CPNI within that existing relationship.

24. The language also suggests, however, that the carrier's right under section 222(c)(1)(A) and (B) is a limited one, in that the carrier "shall *only*" use, disclose, or permit access to CPNI "in the *provision* of" the telecommunications service from which such CPNI is derived or services necessary to, or used in, such telecommunications service.<sup>97</sup> Indeed, insofar as the customer consent in sections 222(c)(1)(A) and (B) is inferred rather than based on express customer direction, we conclude that Congress intended that implied customer approval be restricted solely to what customers reasonably understand their telecommunications service to include. This customer understanding, in turn, is manifested in the complete service offering to which the customer subscribes from a carrier. We are persuaded that customers expect that CPNI generated from their entire service will be used by their carrier to market improved service within the parameters of the customer-carrier relationship.<sup>98</sup> Although most customers presently obtain their service from different carriers in terms of traditional categories of offerings -- local, interexchange, and commercial mobile radio services (CMRS) -- with the likely advent of integrated and bundled service packages, the "total service approach" accommodates any future changes in customer subscriptions to integrated service.<sup>99</sup>

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<sup>97</sup> 47 U.S.C. § 222(c)(1) (emphasis added).

<sup>98</sup> As discussed more fully in the following paragraphs, our judgment concerning what customers expect is supported by our historical understanding of customer preferences as well as the present record. Moreover, we believe that it is in the public interest to implement section 222 and clarify carrier CPNI obligations thereunder at this time. To the extent, however, that we are persuaded in the future that our view no longer manifests such customer expectations, and therefore would not appropriately reflect the scope of section 222(c)(1)(A), we could, and would revisit our conclusions.

<sup>99</sup> See discussion *infra* ¶ 58.

25. For the reasons described below, we believe that the total service approach best represents the scope of "the telecommunications service from which the CPNI is derived." Under the total service approach, the customer's implied approval is limited to the parameters of the customer's existing service, and is neither extended to permit CPNI use in marketing all of a carrier's telecommunications services regardless of whether subscribed to by the customer, nor narrowed to permit use only in providing a discrete service feature. In this way, the total service approach appropriately furthers Congress' intent to balance privacy and competitive concerns, and maximize customer control over carrier use of CPNI.

26. Also, as explained below, with respect to section 222(c)(1)(B), we further conclude that a carrier may use, disclose, or permit access to CPNI without customer approval for the provision of inside wiring installation, maintenance, and repair services because they are "services necessary to, or used in, the provision of such telecommunications service" under section 222(c)(1)(B). In contrast, CPE and information services are not "services necessary to, or used in, the provision of such telecommunications service" within the meaning of section 222(c)(1)(B).

**B. Scope of a Carrier's Right Pursuant to Section 222(c)(1)(A): the "Total Service Approach"**

**1. Background**

27. In the *Notice*, the Commission tentatively concluded that section 222(c)(1)(A) should be interpreted as "distinguishing among telecommunications services based on traditional service distinctions," specifically, local, interexchange, and CMRS.<sup>100</sup> Thus, for example, a local exchange carrier could use local service CPNI to market local service offerings, but could not use local service CPNI to target customers to market long distance offerings or CMRS, absent customer approval. The Commission further tentatively concluded that short-haul toll should be treated as a local telecommunications service when provided by a LEC, and as an interexchange telecommunications service when provided by an interexchange carrier (IXC).<sup>101</sup> The Commission sought comment on these and other possible distinctions among telecommunications services, the scope of the term "telecommunications service," and the costs and benefits of any proposed interpretation, including the interpretation's impact on competitive and customer privacy interests.<sup>102</sup> The Commission also sought comment on the impact of changes in telecommunications technology and

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<sup>100</sup> *Notice* at 12524, ¶ 22.

<sup>101</sup> *Id.* The Commission noted that, for purposes of the *Notice*, "with respect to the BOCs, the term 'short-haul toll' should be interpreted as 'intraLATA toll,' and the term 'interexchange' should be interpreted as 'interLATA.'" *Id.* at 12524, ¶ 22 n.57.

<sup>102</sup> *Id.* at 12524-25, ¶¶ 22-25.

regulation and on whether and when technological and market developments may require the Commission to revisit the issue of telecommunications service distinctions.<sup>103</sup>

28. Commenters recognize that the language of section 222(c)(1)(A) is not clear, and propose at least five different interpretations. First, several parties urge us to interpret section 222(c)(1)(A) as limited to each discrete offering or feature of service subscribed to by a customer.<sup>104</sup> This proposal, which we refer to as the "discrete offering approach," assumes that customers do not expect or understand, for example, that their local exchange carrier would use local CPNI to market the carrier's call waiting feature to them, absent their approval. Second, a number of parties urge us to adopt our tentative conclusion and define the scope of "the telecommunications service from which such [CPNI] is derived" according to the three traditional service distinctions -- local, interexchange, and CMRS.<sup>105</sup> We refer to this as the "three category approach." Under this approach, for example, a customer's local exchange carrier would be able to use local service CPNI to market a call waiting feature to them, as one of many offerings that make up local service, but would not be able to use CPNI to market long distance or CMRS offerings, absent customer approval.<sup>106</sup>

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<sup>103</sup> *Id.* at 12525, ¶ 23.

<sup>104</sup> Ad Hoc Reply at 3-4; CPSR Reply at 6-7; NTIA Further Reply at 9-14; Texas Commission Comments at 8. *See also* CFA Comments at 4 (supports discrete offering approach, but alternatively suggests that three category approach may also be adequate minimum standard).

<sup>105</sup> AICC Comments at 9; AirTouch Comments at 2-4 & n.2; California Commission Comments at 7; California Commission Reply at 5-6; CPI Reply at 7-8 & n.5; CompTel at 6; CompTel Reply at 2-4; Excel Comments at 3; Frontier Comments at 4; LDDS WorldCom Comments at 7-8; LDDS WorldCom Reply at 2-4; MobileMedia Reply at 3; PageNet Comments at 2; Sprint Comments at 2-3; Sprint Reply at 8-9; TRA Comments at 15; TRA Reply at 3-4, 10-11 & n.23; Washington Commission Comments at 4; *see also* Ameritech Comments at 3-4 (supports three category approach if CPNI can be used by any affiliate of the carrier); Arch Comments at 3-4, 6 (supports categories but proposes two CMRS categories -- broadband and narrowband); CFA Comments at 4-5 (supports the three category approach as an alternative to the discrete offering approach; argues that the three category approach, although too broad, is minimum standard necessary); SBT Comments at 1-2 (argues that Commission should forbear from applying three category interpretation to small businesses). We note that NYNEX and PacTel also deemed the three category approach acceptable in their initial pleadings in this docket, although NYNEX would include short-haul toll only in the local service category. NYNEX Comments at 8-10 & n.3; NYNEX Reply at 4 & n.7 (also supporting single category approach); PacTel Comments at 3-4; PacTel *ex parte* (filed Nov. 22, 1996) at 7; PacTel *ex parte* (filed Jan. 17, 1997) at 13. Since their respective mergers, which occurred after their comments were received in this proceeding, however, Bell Atlantic/NYNEX and SBC/PacTel now support the "single category approach." *See, e.g.,* Ameritech, Bell Atlantic, BellSouth, NYNEX, SBC, U S WEST (BOC Coalition) *ex parte* (filed May 9, 1997) at 14; BOC Coalition *ex parte* (filed Aug. 13, 1997) at 11-12.

<sup>106</sup> *See, e.g.,* CPI Reply at 7-8; NYNEX Comments at 11.

29. Third, a variation on the three category approach is what we refer to as the "two category approach," where local and interexchange services constitute separate service categories, but CMRS, like short-haul toll, "floats" between them.<sup>107</sup> Under this approach, for example, an IXC would be able to use CPNI obtained from its provision of long distance service to market CMRS, but would not be able to use long distance CPNI to market local service, without customer approval. Fourth, a number of parties urge us to interpret section 222(c)(1)(A) as referring only to one broad telecommunications service that includes all of a carrier's telecommunications service offerings.<sup>108</sup> This approach, which we refer to as the "single category approach," would permit carriers to use CPNI obtained from their provision of any telecommunications service, including local or long distance service as well as CMRS, to market any other telecommunications service offered by the carrier, regardless of whether the customer subscribes to such service from that carrier.

30. Finally, several proponents of the various approaches further argue that we should permit carriers to share CPNI among all offerings and/or service categories subscribed to by the customer from the same carrier.<sup>109</sup> We refer to this concept as the "total service approach" because it allows carriers to use the customer's entire record, derived from the complete service subscribed to from that carrier, for marketing purposes within the existing service relationship. Although parties supporting this concept advance various alternative schemes, we view it as a separate interpretation of section 222(c)(1)(A) that is defined by the customer's service subscription. Under the total service approach, for example, a carrier whose customer subscribes to service that includes a combination of local and CMRS would be able to use CPNI derived from this entire service to market to that customer all related offerings, but not to market long distance service to that customer, because the customer's service excludes any long distance component. Thus, under the total service approach, the

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<sup>107</sup> MCI Comments at 3-5; MCI Reply at 4. In addition, BellSouth, GTE, NTCA/OPASTCO, and U S WEST support this approach as an alternative to their first choice, the single category approach. BellSouth Comments at 11-12; GTE Comments at 11-12; GTE Reply at 2, 4 & n.4; NTCA/OPASTCO Reply at 3; U S WEST Comments at 5, 12-13.

<sup>108</sup> ACTA Comments at 4-5; ALLTEL Comments at 3-4; Ameritech Comments at 3; AT&T Comments at 2-3, 6-11; AT&T Reply at 2-7, 9-10; Bell Atlantic Comments at 2-7; Bell Atlantic Reply at 4-6, att.; BellSouth Comments at 4, 6-10; BellSouth Reply at 4-6; CBT Comments at 3-5; GTE Comments at 10-11; GTE Reply at 1-4; MFS Comments at 3-4; NTCA/OPASTCO Reply at 1-3; SBC Comments at 5-9; SBC Reply at 6-9; USTA Comments at 2-4; USTA Reply at 3-5; U S WEST Comments at 4-6, 10-12; U S WEST Reply at 5 n.18, 7 n.30. See also ICG Comments at 5 (single category approach should apply for CLECs, but not ILECs); NYNEX Reply at 4 (supports single category approach as alternative to three category approach).

<sup>109</sup> See, e.g., ACTA Comments at 4; Ameritech Comments at 12; MCI *ex parte* (filed Aug. 15, 1997) at 13-17; SBC Reply at 7 n.22; Sprint Comments at 2-3 (but only for entities without market power); Sprint Reply Comments at 8-10 (same). The Texas Commission and Ad Hoc support a total service approach, although they would permit the sharing of CPNI only between the discrete offerings to which a customer subscribes. Ad Hoc Reply at 5-6; Texas Commission Comments at 8.

carrier's permitted use of CPNI reflects the level of service subscribed to by the customer from the carrier.

## 2. Discussion

31. As discussed below, we conclude that the total service approach best protects customer privacy interests, while furthering fair competition, and thereby best comports with the statutory language, history, and structure of section 222.

### a. Statutory Language, History, and Structure

32. The statutory language makes clear that Congress did not intend for the implied customer approval to use, disclose, or permit access to CPNI under section 222(c)(1)(A) to extend to all of the categories of telecommunications services offered by the carrier, as proposed by advocates of the single category approach. First, Congress' repeated use of the singular "telecommunications *service*" must be given meaning. Section 222(c)(1) prohibits a carrier from using CPNI obtained from the provision of "a telecommunications *service*" for any purpose other than to provide "the telecommunications *service* from which such information is derived" or services necessary to, or used in, provision of "*such* telecommunications *service*."<sup>110</sup> We agree with many commenters that this language plainly indicates that Congress both contemplated the possible existence of more than one carrier service and made a deliberate decision that section 222(c)(1)(A) not extend to all.<sup>111</sup> Indeed, Congress' reference to plural "telecommunications *services*" in sections 222(a) and 222(d)(1) demonstrates a clear distinction between the singular and plural forms of the term.<sup>112</sup> Under well-established principles of statutory construction, "where Congress has chosen different language in proximate subsections of the same statute," we are "obligated to give that choice

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<sup>110</sup> 47 U.S.C. § 222(c)(1).

<sup>111</sup> See, e.g., California Commission Comments at 7; CPI Reply at 7 n.5; Frontier Comments at 4; LDDS WorldCom Comments at 7; NTIA Further Reply at 11-12 & n.13; Sprint Reply at 9; TRA Reply at 10.

<sup>112</sup> Section 222(a) provides: "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling *telecommunications services* provided by a telecommunications carrier." 47 U.S.C. § 222(a)(emphasis added). Section 222(d)(1) provides that: "[n]othing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers . . . (1) to initiate, render, bill, and collect for *telecommunications services*; . . ." 47 U.S.C. § 222(d)(1)(emphasis added). See also *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776 at ¶ 439 (1997) (*Universal Service Report and Order*) ("[the] varying use of the terms 'telecommunications services' and 'services' in sections 254(h)(1)(A) and 254(h)(1)(B) suggests that the terms were used consciously to signify different meanings.").



effect.<sup>113</sup> Consistent with this, section 222(c)(1)'s explicit restriction of a carrier's "use" of CPNI "in the provision of" service further evidences Congress' intent that carriers' *own* use of CPNI be limited to the service *provided to* the particular customer, and not be expanded to all the categories of telecommunications services *available from* the carrier.<sup>114</sup>

33. We therefore reject the single category approach as contrary to the statutory language. In particular, we do not agree with several parties' claim that the general definition of "telecommunications service" found in Title I of the Act, which focuses on the *offering* of "telecommunications . . . regardless of the facilities used,"<sup>115</sup> indicates that Congress did not intend to differentiate among telecommunications technologies or services in section 222(c)(1)(A).<sup>116</sup> We likewise find U S WEST's reliance on the general plural reference included in the definition of "telecommunications" misplaced.<sup>117</sup> Rather, we agree with the California Commission, CompTel, MCI, and TRA that the single category interpretation would render the specific limiting language in section 222(c)(1)(A) meaningless.<sup>118</sup> Approval would be necessary, if at all, only if a carrier wished to use CPNI to market non-telecommunications services.<sup>119</sup> Like Sprint, we conclude that, had Congress intended such a result, the text could have been drafted much more simply by stating that

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<sup>113</sup> *Cabell Huntington Hospital, Inc. v. Shalala*, 101 F.3d 984, 988 (4th Cir. 1996); see also, e.g., *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984) ("When Congress uses explicit language in one part of a statute . . . and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing.").

<sup>114</sup> TRA Comments at 15; TRA Reply at 3, 9.

<sup>115</sup> "Telecommunications service" is defined as: "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). "Telecommunications" is defined in the Act as: "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

<sup>116</sup> AT&T Comments at 6-7, 6 n.4; SBC Comments at 6-7; U S WEST Reply at 5 & n.18; see also USTA Reply at 4 (definition of telecommunications service does not distinguish as to technology, service, or use); MFS Comments at 3-5 (Congress' inclusion of explicit definitions of "telecommunications," "telecommunications service," and "telecommunications carrier" indicates its intent that the Commission use those definitions).

<sup>117</sup> U S WEST argues that "telecommunications service" can be described as a "plural noun" because that term's statutory definition refers back to a definition that itself includes a plural reference, and because that term should also be construed similar to the 1992 Cable Act's use of "cable service" to include both basic tier and premium services. U S WEST *ex parte* (filed Apr. 11, 1997) at 5-6 (citing 1992 Cable Act, 47 U.S.C. § 551).

<sup>118</sup> California Commission Reply at 6; CompTel Comments at 4-5; CompTel Reply at 3; MCI Reply at 3; MCI *ex parte* (filed June 6, 1997) at 1; TRA Reply at 9.

<sup>119</sup> CompTel Reply at 3 n.7; MCI Reply at 3.